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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/071,882	02/08/2002	Kristin A. McCloskey	WMO 3E4	8759

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EXAMINER

HECKENBERG JR, DONALD H

ART UNIT	PAPER NUMBER
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1722

DATE MAILED: 09/27/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/071,882

Applicant(s)

MCCLOSKEY ET AL.

Examiner

Donald Heckenberg

Art Unit

1722

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 15-18 is/are allowed.
- 6) ☒ Claim(s) 1-14 and 19 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 5. 6) ☐ Other: \_\_\_\_

Art Unit: 1722

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1 and 12-14 are rejected under 35 U.S.C. 102(b) as being anticipated by Gay et al. (US Pat. No. 4,215,843).

Gay teaches an apparatus for making confections comprising a base platform (12) having an alignment member (the alignment member being the upper edge of the platform resting in recess 100, see col. 4, lns. 32-36), and a confection mold tray (22) including an alignment structure (100) configured to engage the alignment member of the base platform (see fig. 3).

Gay further teaches the base platform to include a mount configured to hold a dispenser bottle (38) for pouring a confection solution into the mold tray (see figs. 2 and 3). Gay also teaches the confection solution to be configured to harden into a gel confection (col. 1, ln. 62 - col. 2, ln. 7).

3. Claims 1-8 are rejected under 35 U.S.C. 102(b) as being anticipated by Sway (US Pat. No. 3,921,801)

Art Unit: 1722

Sway teaches an apparatus comprising a base platform (30) having an alignment structure (36), and a mold tray including an alignment structure configured to engage the alignment member of the base platform (see fig. 18, and col. 3, lns. 58-61).

Sway further teaches the apparatus to comprise a plurality of mold trays configured for vertical stacking one on top of another and vertically removable from the base platform (see fig. 18). The arrangement of the trays is such that they could be rotated about a central axis (see fig. 18).

Sway also teaches the mold trays to include a mold design cavity including an animal (44).

It is noted that the claims recite an intended use of the apparatus, specifically to be used as a children's toy for making confections. However, it is well settled that the intended use of an apparatus is not germane to the issue of patentability of the apparatus. If the prior art structure is capable of performing the claimed use, then it meets the claim limitation(s). In re Casey, 370 F.2d 576, 580 152 USPQ 235, 238 (Cust. & Pat. App. 1967); In re Otto, 312 F.2d 937, 939, 136 USPQ 458, 459 (Cust. & Pat. App. 1963). In the instant case, the design of the apparatus of Sway is such that the mold cavities could be used in a confection molding process, and therefore meet the limitations of the instant apparatus claims.

Art Unit: 1722

4. Claim 19 is rejected under 35 U.S.C. 102(b) as being anticipated by McBride (US Pat. No. 5,458,243).

McBride teaches an apparatus comprising a base platform (18) having a vertical alignment member (16) located concentric with a central axis, a plurality of stackable rotatable trays (12) including alignment apertures configured to engage the vertical alignment member of the base platform as the trays are stacked, and wherein the trays are configured to rotate around the central axis.

As noted above, the intended use recited in an apparatus claim is not germane to the issue of patentability of the apparatus. The apparatus taught by McBride having the trays (12) could be used in a molding operation with a confection mixture, and thus anticipates all of the instant apparatus claim's limitations.

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the

Art Unit: 1722

art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

6. The factual inquiries set forth in Graham v. John Deere Co., 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

7. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Art Unit: 1722

8. Claims 9-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sway.

Sway teaches the apparatus as described above, including the mold trays to have a design cavity such as an animal. Sway further teaches the apparatus to have different design cavities depending on the desired product shape to be molded (see figs. 8-11 and 19). Although Sway fails to teach the animal shape to be an earthworm or bear, or for the design to be a ring shape, it would have been obvious to one of ordinary skill in the art at the time of the Applicant's invention that the shape of the cavity could be modified to include such shapes if it was desired to create a product of such a shape given Sway's teaching of the manipulation of the mold cavity design.

9. Claims 15-18 are allowed.

10. The following is a statement of reasons for the indication of allowable subject matter:

The prior art of record fails to teach or suggest a kit for making confections of preselected designs comprising a base platform having an alignment member, a plurality of stackable confection mold trays including an alignment structure configured to engage the alignment member of the base platform,

Art Unit: 1722

a confection mixture configured to be dissolved in a solvent and then solidify into eatable confections and instructions for making the confections using the base platform, stackable confections molds, and confections mixture as recited in claim 15.

The closest prior art taught by Gay is described above. Gay fails to teach or suggest the apparatus/kit to include a plurality of stackable trays all including an alignment member structure configured to engage the alignment member of the base platform. Nor could the arrangement of Sway be manipulated in such a manner given the placement cavities shown in fig. 14.

11. The following references are cited, but not relied upon, as being pertinent to the instant application:

Barnes (US Pat. No. 1,817,339) teaches a mold for making edible products into the shape of animals.

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Donald Heckenberg whose telephone number is (703) 308-6371. The




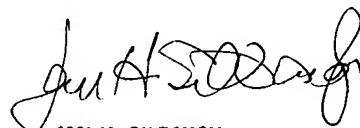
Art Unit: 1722

examiner can normally be reached on Monday through Friday from 9:30 A.M. to 6:00 P.M.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Jan Silbaugh, can be reached at (703) 308-3829. The official fax phone number for the organization where this application or proceeding is assigned is (703) 872-9310 for responses to non-final action, and 703-872-9311 for responses to final actions. The unofficial fax phone number is (703) 305-3602.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

  
Donald Heckenberg  
September 25, 2002

  
JAN H. SILBAUGH  
SUPERVISORY PATENT EXAMINER  
ART UNIT 1722  
09/25/02